IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4228 of 2001

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI

and

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KAMLESH B BACHKANIWALA

Versus

UNION OF INDIA

Appearance:

MR BHARAT T RAO for Petitioners.

MR DN PATEL for Respondents.

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI

and

MR.JUSTICE K.A.PUJ

Date of decision: 11/01/2002

CAV JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

The petitioners, in this petition, have

challenged the summons dated 16.2.2001 issued by the respondent No.3 under Section 108 of the Customs Act on the petitioners calling upon them to remain present in their office in connection with enquiry being made by him with regard to the import of second-hand machinery Teijin Seiki Draw Twister Model DT-210-T by M/s. Nova Petrochemicals Ltd., Moriya Village, Sarkhej-Bavla Highway, Ahmedabad.

2. The brief facts leading to the issuance of the said summons and to the challenge against the issuance of the said summons made by the petitioners, are as under. The petitioners are engaged in the business of manufacturing of textile fabrics/textile machineries of different varieties for the last about 20 years. The petitioner No.1 Company had entered into technical collaboration with M/s. Teijin Seiki Co.Ltd., Japan, some where in 1987 or 1988 for the manufacture of DT-200 Draw Twister Model machines which lapsed some time in 1992 or 1993. The petitioner No.1 company had no technical or financial collaborations with the said Japanese company either directly or indirectly, after 1992.

3. It is further submitted in the petition that one Ahmedabad based company, namely M/s. Nova Petrochemicals Ltd., had imported second-hand Draw Twister Model machinery. The Bill of Entry filed by the said company with the respondent No.3 had raised certain disputes on the document and hence enquiry was started by the respondent No.3 for collection of certain material details. In the process of the said enquiry, the respondent No.3 has sought the help of the petitioners and according to the petitioners they have made all efforts to collect the information and whatever information supplied by the Japanese company were furnished by them to the respondents. However, it appears from the pleadings that the respondent authorities were not satisfied with the reply given by the petitioners and hence they went on issuing correspondence asking for the details from the petitioners. It is further pleaded that all sincere efforts were made by the petitioners to collect information from the Japanese company. However, the said Japanese company had refused to part with certain documents as per their trade policy.

4. The petitioners have further stated that the respondents, instead of collecting the relevant details from the importer, and also instead of following the due procedure or process to obtain the same through the

Ministry of Finance, went on harassing the petitioners by writing letters after letters and threatening them for penal action. Since the protracted correspondence on the subject did not yield any result the petitioners were harassed by the respondents by issuing summons after summons under Section 108 of the Customs Act, inspite of the fact that the petitioners have nothing to do with the Bill of Entry filed by the importer, with the respondents.

5. The petitioners have further pleaded that even if it is assumed that any illegality was committed by the importer, the remedy left with the respondents is to take appropriate action under Section 5 to 8 of the Customs Valuation Act against such importer. The petitioners have neither imported the machinery nor they have made any help or assistance to the company who has imported such second-hand machinery. The petitioners have also raised the plea that the summons under Section 108 can be issued only in such circumstances when the officer is under the bonafide impression that the particular documents are in the custody of the petitioners. The documents required by the respondents were not in the custody of the petitioners and therefore the petitioners have submitted that the exercise of power by the respondents in issuing the summons under Section 108 of the Act is erroneous, illegal and therefore beyond the scope and ambit of the enquiry contemplated under the said Section. Lastly, it was submitted by the petitioners that issuance of summons under Section 108 of the Act is nothing but the arbitrary exercise of the power by the respondents and the same is illegal and contrary to the provisions of law and hence the said summons issued by the respondents on 16th June 2001 requires to be quashed and set aside in the interest of justice.

6. This Court has issued the notice on the respondents and an affidavit-in-reply was filed on behalf of the respondents. The respondents have opposed the petition and contended that challenge made by the petitioners against the issuance of summons under Section 108 of the Act is wholly unjustified and unreasonable. The respondents have explained in detail as to how and at what circumstances the summons have been issued by the respondents on Shri Kamlesh B. Bachkaniwala and Shri Pannalal H. Bachkaniwala, Directors of the petitioner No.1 company. It was stated in the affidavit-in-reply that one M/s. Nova Petrochemicals Ltd., of Ahmedabad has imported one set of second-hand Teijin Seiki Draw Twister Model machine from M/s. Machine World, Korea and filed

Bill of Entry for clearance. As per the Export Import Policy 1997-2002 second-hand capital goods are allowed for import without specific import licence only when they are not more than 10 years old. Accordingly, in order to ascertain the importability of the second-hand capital goods, the year of manufacture is required to be known. Moreover, further directions were issued by the Ministry of Finance (Department of Revenue), Government of India, vide Circular F. No. 493/124/86-Cus.VI dated 19.11.1987 with regard to valuation of second-hand machinery and fixation of scale of depreciation and according to this Circular, the depreciation is to be calculated on the capital value of the machinery under import. It appeared to the respondent authorities that the year of manufacture was not declared in proforma invoice as well as in commercial invoice. The importer was therefore asked to seek the clarification from the Supplier/Chartered Engineer with regard to certain discrepancies found out by the respondent authorities. The importer communicated to the respondent authorities that the supplier was not cooperating with them and hence the requisite information could not be supplied. It is further revealed on examination of goods on first check basis that the date of manufacture was written as "November 1992" in different fonts than the other details which were written on the name-plate of the machine. It was also found that on power cables, the year of manufacture was found to be written as "1988".

7. Since the importer was not ready to cooperate with the respondent authorities, the respondent authorities started enquiry about the source in India through whom the respondent authorities can obtain the information regarding the year of manufacture as well as the price in the year of manufacture in the subject case from the manufacturer of the said machine. That is how the petitioners have come into picture as the petitioners were having collaboration with the manufacturing company of Japan. The object of the respondent authorities to get the factual information from the manufacturer of machines based in Japan through the petitioners was only to expedite the case because the person who is based in India and dealing with the foreign company knew the concerned person of the foreign company.

8. During the course of enquiry, the respondent authorities have found that the petitioners were not giving correct information to the respondent authorities. They have further found that the facts submitted by the petitioners created doubts about integrity and this led them to believe that the petitioners were either aware of

the fact and did not want to disclose it or they were under the influence of some persons to misguide the respondent authorities. Certain specific instances were pointed out in the affidavit-in-reply to this effect. It was further pointed out that the value of goods including the value of the similar machines already cleared at JNPT Customs House by the same importer from the same supplier was more than 1.75 crores. If the year of manufacture is found to be more than 10 years old, the subject machine as well as several other machines already installed in the importer's factory are liable to confiscation under Section 111(d) and 111(m) of the Act and the importer would be liable for penal action under Section 112(a) of the Act. The respondent authorities have further found that if the fax message received through the petitioners initially certifying the price in the year of manufacture found to be true, they have to pay additional custom duty of approximately Rs. 40 lakhs. The respondent authorities have further found on the basis of the evidence available with them that in India DT 210 model manufactured by M/s. Teijin Seiki, Japan in the year 1978, were installed which made it evident that M/s. Teijin Seiki was manufacturing DT 210 model in the year 1978. It was presumed by the respondent authorities that M/s. Himson Textiles signed technical collaboration with since M/s.Teijin Seiki, they should be aware of the fact that whether DT-210 model was in production or not. On the basis of these discrepancies, the respondent authorities had reasonable suspicion that the subject machines were manufactured either in 1978 or before and hence the importer was restrained from importing such machine and after such import they are liable for confiscation under Section 111(d) and 111(m) of the Act. The respondent authorities were of the bonafide view that questioning of Shri Kamlesh B. Bachkaniwala and Shri Pannalal Bachkaniwala would reveal certain facts which would be helpful in ascertaining truths by the respondent authorities. It is in this view of the matter, the impugned summons were issued by the respondent authorities.

9. That the petitioners have filed affidavit-in-rejoinder to the affidavit-in-reply filed by the respondents and disputed the facts stated therein.

10. We have heard Mr. B.T. Rao, learned advocate for the petitioners and Mr. D.N. Patel, learned Standing Counsel appearing for the respondents. The question that is posed for our consideration is as to whether the respondents are justified in issuing summons under Section 108 of the Act and if so what is the scope and extent of issuance of such summons. To appreciate

this point, it is necessary to have a look at the provisions contained in Section 108 of the Act which read as under :

"108. Power to summon persons to give evidence and produce documents.___

(1) Any gazetted officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required :

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860)."

The object of this Section empowering the Customs Officers to record the evidence under Section 108 is to collect information as to contravention of the provisions of the Act or concealment of the contraband or avoidance

of the duty of excise so as to enable them to collect the evidence or the proof of the contravention of the provisions of the Act and to take proceedings for further action on confiscation of the contraband or imposition of the penalty under the Act, etc. The words used in the section is "any person", meaning thereby the enquiry is not restricted either to the importer or to the manufacturer. It takes within its sweep any person whose attendance is necessary either to give evidence or to produce document or any other thing in any enquiry which the concerned officer is making in connection with the smuggling of any goods. In the present case, the enquiry is with regard to the import of second-hand machinery, namely Teijin Seiki Draw Twister Model DT-210 by M/s. Nova Petrochemicals Limited, Ahmedabad. The respondent authorities were of the bonafide view that the requisite details could be collected from the petitioners and keeping this point in mind, the detailed correspondence was exchanged between the petitioners and the respondent authorities. During the course of inquiry, they found that the petitioners were not cooperating and the requisite details were in their possession and yet the same were not parted with. The collaboration agreement, which the petitioners have entered into with the Japanese Company was also not produced on the ground that it was a trade secret and they were not supposed to produce that document. It is for the respondent authorities to decide as to what details are relevant for the purpose of their enquiry and the same cannot be withheld by the petitioners on the ground that the same being trade secret they were not supposed to provide such details before the statutory authorities. The reason canvassed by the petitioners does not appear to us as convincing. Looking to the tenor of the Section and to the nature of enquiry contemplated, it is difficult for us to hold that the petitioners are justified in not responding to the summons issued by the respondent authorities under Section 108 of the Act. We, therefore, find no reason to interfere in the process of enquiry undertaken by the respondent authorities and the issuance of summons under Section 108 being part of such enquiry cannot be stayed having regard to the facts and circumstances of the case. We, therefore, decline to interfere in the matter. The petition is dismissed.

11. It is, however, made clear that it is expected from the respondent authorities that while issuing summons under Section 108 and while insisting due compliance of the said summons, they must see to it that the persons summoned may not be faced with any undue hardships or harassment and to the extent possible, the

respondent-authorities should confine the enquiry to the object sought to be achieved by them. With these observations, notice is discharged with no order as to costs.

[D.M. Dharmadhikari, C.J.]

rmr. [K.A. Puj, J.]